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IN THE
SUPREME COURT OF THE UNITED STATES

DAVID H. LEMPERT,

PETITIONER,

v.

REPUBLIC OF KAZAKSTAN,
MINISTRY OF JUSTICE,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the U.S. courts can transfer constitutional sovereignty to a foreign state to unilaterally judge whether a U.S. citizen is in compliance with U.S. law and professional Bar Association and other professional oaths as the material issues in a contract dispute and whether such transfer is in violation of the U.S. citizen's Fifth Amendment due process rights and the express Congressional delineation under the U.S. Foreign Sovereign Immunities Act of the court's constitutional sovereignty and citizen rights.

2. Whether U.S. courts can transfer sovereignty to a foreign court to judge a contract that such government has signed with a U.S. citizen, after the foreign country has already expressly waived its sovereignty by virtue of its giving review authority to an international organization of which the U.S. is a key member and where the U.S. is a party/beneficiary to the contract, and where the international organization has stipulated the need for that review and waiver of sovereignty because a material term of the contract and the purpose of hiring an American lawyer were to ensure that international standards and laws are upheld, rather than the weaker standards of the foreign country.

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No. 02-____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

DAVID H. LEMPERT,

PETITIONER,

v.

REPUBLIC OF KAZAKSTAN,
MINISTRY OF JUSTICE,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

David H. Lempert respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a – 3a) is unreported. The opinion of the district court (Pet. App. 4a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was issued on May 1, 2002. Pet. App. 1a. The court denied a timely petition for rehearing and suggestion for rehearing en banc on June 30, 2003. Pet. App. 12a, 13a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **U.S. Constitution Article III § 1** establishes in relevant part:

"the judicial power" extends to "all cases in law in equity, arising under this Constitution" and to "controversies *** between a State, or the citizens thereof, and foreign states, citizens or subjects."

The **U.S. Constitution Article VI** establishes in relevant part:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . and all ... judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution"

The **Fifth Amendment** provides in relevant part:

"No person shall be *** deprived of life, liberty, or property, without due process of law."

The **Fourteenth Amendment** provides in relevant part:

No State shall *** deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1602 provides in relevant part: that:

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts . . . .

28 U.S.C. § 1605 provides that

commercial activity or other facts can be used to establish an *** explicit or implicit waiver [of the foreign sovereignty]

STATEMENT

This petition arises from the activities of an American lawyer, working overseas to defend U.S. interests and U.S. laws and to further U.S. and international goals of creating an international system based on rule of law, on one of the first contracts in the growing field of international legal development under the direction of the World Bank.

In 1997, Petitioner worked in the United States and in Kazakstan, a country that the World Bank had identified as characterized by "[w]eak contract enforcement", as an "international legal consultant", recommended by the World Bank and following a World Bank Terms of Reference. His task was to design loan projects that could be funded by the World Bank and member states including the U.S., to build the

rule of law and improve the enforceability of contracts in that country. The World Bank recommended and approved the selection of Petitioner, a U.S. lawyer, specifically because Kazakstan's own lawyers had proposed loan projects that violated World Bank rules for self-dealing. Petitioner signed a contract with the Ministry of Justice of Kazakstan at the direction and subject to the approval of the World Bank, with World Bank review written specifically into the contract.

Petitioner was hired to prepare specific proposals for several millions of dollars of loan requests reviewable by the World Bank and U.S. government and meeting their standards, as the major component of a report on legal reform. He did so. The Ministry thereafter rejected his report as unsatisfactory and refused to pay him. In Petitioner's view this rejection was unjustified and the changes requested by the Ministry to his report were inconsistent with his professional obligations and with the truth, as well as in violation of U.S. law. Petitioner sued for breach in U.S. courts, under the Foreign Sovereign Immunities Act that would allow the case to proceed.

The Ministry sought to put the case in its own courts, arguing that it had the sovereign immunity to do so under the Foreign Sovereign Immunities Act 28 U.S. § 1602 and subsequent, filing a motion to dismiss.

Petitioner argued that the Ministry had already waived sovereignty, given the World Bank and U.S. review, and made clear to the court that if this case is allowed to proceed anywhere -- i.e., in the United States, the only forum in which Petitioner's professional and legal obligations can be judged, since the Ministry would be judging itself in its own courts -- it will ultimately turn on whether the justifications offered by Kazakstan for rejecting Petitioner's work and refusing him payment were valid, or whether, as Petitioner contends, those

justifications were a sham and his work was rejected because of: (a) his refusal to pay a kickback of roughly 8% of his contract fee to a designee of the government, and (b) his refusal to alter his report so that subsequent loans made by the World Bank based upon the report would be made to pre-selected affiliates of the Kazakstan government.

Before the District Court, Petitioner raised the issues on the meaning and purpose of the Foreign Sovereign Immunities Act, questions of due process rights, policy interests involved in the dispute, and whether or not Respondent had any protected sovereignty interest that it had not waived, in responding to the statutory tests and interpretations of the Act.

The Ministry offered into evidence a letter from the World Bank acknowledging that the contract was subject to World Bank review and to review by the Executive Branch of the U.S. government and acknowledging that issues of contract breach were judicial determinations and the Bank could not render a legal opinion. The Bank noted its interest in seeing the contract completed to the satisfaction of the Ministry.

At the urging of the District Court, the parties conducted a series of negotiations with the intention of agreeing to binding international arbitration. Despite an agreement reached by counsel that Petitioner agreed to sign, Kazakstan was unwilling to agree to arbitration and the District Court was obliged to rule on the pending motion to dismiss. Respondent, Kazakstan, has yet to respond to the issues in the complaint and has sought to deny any form of conciliation outside of its own courts.

In its decision, the District Court asserted that the Ministry had protected sovereignty and avoided discussion of the purpose of the Act or Petitioner's due process rights. The District Court alsc narrowly applied some of the tests in the Act

to conclude that Petitioner's work on developing World Bank loan projects was not "commercial" and that the project had no important ties to the U.S.

Though Petitioner requested the Court of Appeals to hear the constitutional issues that Petitioner had first raised at the District level as a matter of right, as well as to look again at the hearsay declarations of the Respondent, including its decision not to pay, sent on a World Bank Fax rather than from a government office, the court avoided deciding these issues a second time, even without input from the Respondent, wrongly claiming that the issues had never been raised. Respondent made no appearance and filed no brief on appeal. Respondent's counsel severed its relationship with Respondent after the district decision and Respondent has not had any representation or been a party to the proceedings, since.

On appeal, Petitioner alerted the court to Respondent's presumptively perjured hearsay declarations by a Vice Minister who had not worked at the Ministry when the events took place, about the "customary practice" of payment that contradicted the record of a bank transfer and payment in dollars to Petitioner's U.S. account, consistent with the contract terms, as well as about initial payments to Petitioner in Kazakstan currency (that Petitioner also swears were made in U.S. dollars) as well as other unsubstantiated facts on which the lower courts relied. The Court of Appeals took no notice of Petitioner's arguments about the burden of proof, and treated the foreign declarations as fact, in its decision.

The court decisions now leave Petitioner without any neutral forum for resolving this dispute; i.e., no real and no safe forum at all.

SUMMARY OF ARGUMENT

The question presented by this petition for certiorari, is a simple one: Will Petitioner's resistance to fraud and corruption and his dedication to his professional standards as a U.S. lawyer be reviewed by a United States court of law, or will American courts simply be able to shoo him off to Kazakstan where he would face the very problem he was sent to reform -- weak contract enforcement and self dealing, and, according to the U.S. Department of State,[1] would not be afforded a fair hearing, could potentially be in physical danger, and where the party he would face is the body that previously administered and continues close links with the courts itself, the Ministry of Justice?

The courts have held that dismissal of an action is inappropriate if it means that the plaintiff will be denied a remedy in the foreign courts. See Piper Aircraft, 454 U.S. 235, 254 n.22 (1981); cf. El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 678 (D.C. Cir. 1996) (deeming affidavit in support of dismissal inadequate for failing to negate apparent barriers to foreign jurisdiction). That has not deterred the lower courts from seeking to quickly remove this matter from its docket.

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[1] According to the Department of State's Human Rights Report for Kazakstan in the year 2000 [available at http://www.state.gov/g/drl/rls/hrrpt/2000/]: "The problem of corruption is evident at every stage and level of the judicial process. Lawyers and human rights monitors alleged that judges, prosecutors or other officials solicit bribes in exchange for favorable rulings in nearly all criminal cases." Moreover: "Members of the security forces committed extrajudicial killings through . . . mistreatment of individuals in custody." Petitioner is unwilling to travel again to Kazakstan and believes the lower court's suggestion that he do so is action that puts his life, liberty and property interests at risk.

Were this case to go to a Kazakstan court, Petitioner's arguments will not be heard or will be rejected as irrelevant to the case in Kazakstan -- Petitioner's refusing to falsify his report because of his need to uphold the U.S. False Claims Act, 37 U.S.C. § 3729, and protect U.S. taxpayers; to not participate in any schemes that Petitioner viewed as fraud and that could subject Petitioner or others to felony prosecution in the U.S. and loss of liberty; and to not pay "kickbacks" in violation of the Foreign Corrupt Practices Act, 15 U.S.C. §78; to adhere to the integrity of his professional ethics as a U.S. lawyer and member of the California Bar.

Petitioner's single remedy to protect professional standards of lawyers working on international legal development projects, like this one, under the auspices of the World Bank, and to uphold U.S. law in such projects, is in the U.S. courts, following the intent of the Foreign Sovereign Immunities Act 28 U.S. § 1602 and subsequent.

The lower courts have denied such a remedy by declaring the work of U.S. lawyers in developing bank loans to be funded by the World Bank (and the U.S.) as not "commerce" with "ties to the U.S.", in conflict with previous court decisions (Pet. App. 2a and 3a). At the same time, the lower courts have consistently ducked the issues of whether U.S. lawyers are afforded constitutional protections in such work, and whether contracts with World Bank oversight have contacts to the United States (given U.S. membership in the Bank and its location in the U.S.) and are a waiver of sovereign immunity, or whether the issue of protecting U.S. laws and sovereignty is a protected interest under the Act, though Petitioner has raised these issues at every level (Pet. App. 2a and 1a).

The Court of Appeals limited determinations to 1) a logic defying interpretation of causal sequence -- misreading

the court's decision in Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992) to imply that pressures on Respondent to break the law had to be the "immediate consequence" of the refusal to pay at the time of breach rather than before the formal breach (saying that its decision would have no immediate consequence on the activities of American lawyers working on legal reform projects overseas or have an impact on U.S. interests in U.S. lawyers seeking to follow the law and professional codes without pressures to break them); and 2) declaration of lawyers' work in legal development as non-commercial and without ties to the U.S., by defining a contract to write loan proposals that would be submitted to the World Bank (and U.S. Treasury Department) as separable from commercial activity. This runs counter to the intent of the court's decision in Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993) and the Foreign Sovereign Immunities Act.

In part, the court avoidance of the matter is also due to a lack of clarity in the Foreign Sovereign Immunities Act over what constitutes a "waiver" of sovereignty by a foreign State and over exactly which constitutional rights and U.S. interests the Act upholds in its balancing test. In largest part, the lower courts have sought to avoid decisions on international political issues and conduct of U.S. foreign policy, requiring that the decision be made by the highest court in the land.

This case calls for a decision by the Supreme Court on two grounds:

(1) The District and Appeals courts have sought to avoid offering Petitioner the remedy to which he is entitled under the U.S. Constitution and under the Foreign Sovereign Immunities Act, to pursue an action for breach of contract against a foreign State on an international legal development project subject to review by an international organization of which the U.S. is a member, and they have refused to consider

issues of constitutional protections and American interests in such a case, likely because of the international political issues and sensitivities involved, that touch on matters of the conduct of U.S. foreign policy and are best the prerogative of the Supreme Court. Petitioner will prove, if this case goes to court, that the reason for breach by the Respondent, Kazakstan, was not the inability to perform, since Petitioner completed his work to international standards, but Petitioner's unwillingness to falsify loan requests and data and to pay kickbacks to officials designated by Kazakstan officials in the course of his work, because it could subject him to prosecution for felony under U.S. law and potential disbarment from the California Bar. The sensitivity of a foreign deputy Minister of Justice misrepresenting the World Bank's role in a contract and presenting hearsay information outside personal knowledge and in a sworn declaration are also matters to be dealt with by the highest court of the land.

This case calls for an exercise of the court's supervisory power and authority in making a determination that the lower courts have avoided making, under Rule 10 (a) of the court rules.

(2) To avoid hearing the merits of this case in their courts, the United States court of appeals and district court have manufactured "sovereignty" interpretations to the benefit of a foreign State in violation of previous court decisions on what constitutes commercial and other ties to the U.S. and on which constitutional rights of a U.S. citizen and U.S. interests are to be considered in applying the balancing test under the Foreign Sovereign Immunities Act. Among these considerations are whether sending a U.S. citizen to a State where he could be in physical danger and where his Bar Association oaths and obligations under U.S. law are not protected can be weighed against the asserted "inconvenience" to a foreign government

and its offered hearsay declarations about its lack of contacts to the U.S., in the hiring and payment of American lawyers as international experts helping seek World Bank loans to world standards for legal reform.

This case calls for an exercise of the court's authority in resolving interpretations of the Foreign Sovereign Immunities Act by lower courts that are inconsistent with previous decisions of the Supreme Court and may require further clarification by the court of the meaning of the act, under Rule 10 (b) of the court rules.

Constitutional issues of U.S. sovereignty, constitutional determinations on U.S. citizen rights to livelihood and due process and issues relating to U.S. efforts and ability to properly and professionally build rule of law and a safer world community, to minimize the risk of terrorism and improve international commerce and rights, are issues of exceptional importance to the U.S. and to the world community. Members of the Bar in the U.S. are increasingly being called upon to work internationally to help foreign states develop "rule of law", both as part of global concern for building legal systems that can effectively protect rights and resolve disputes without giving rise to movements for violence or terrorism, and for enforcing contracts to promote trade and it falls on the Supreme Court to protect this profession and U.S. interests.

Unless the Supreme Court rules on these issues, the unpublished precedent that the lower courts have now established is that foreign governments can hire American lawyers and then strip them of their responsibilities under United States law during their work overseas. In effect, the lower courts have sent a message to American lawyers working in international legal development projects that U.S. courts sanction extra-legal contract demands that may violate American criminal law and will put the self-interest of some

individuals working for foreign governments in need of reform before American lawyers working on projects to help promote legal reform for the benefit of citizens of those countries and in promotion of U.S. and international interests. The Courts are effectively subjecting United States attorneys to pressures to break U.S. law and professional oaths since the laws of countries like Kazakstan, that are objects of reform projects, will not recognize or uphold the American laws and professional obligations to which American citizens and attorneys are subject.

Only the Supreme Court can right this wrong and send a message to the courts on how they are to read the Foreign Sovereign Immunities Act in this growing area of concern.

ARGUMENT

I. THE DISTRICT AND APPEALS COURTS HAVE SOUGHT TO AVOID OFFERING PETITIONER THE REMEDY TO WHICH HE IS ENTITLED UNDER THE U.S. CONSTITUTION AND UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT, TO PURSUE AN ACTION FOR BREACH OF CONTRACT AGAINST A FOREIGN STATE ON AN INTERNATIONAL LEGAL DEVELOPMENT PROJECT SUBJECT TO REVIEW BY AN INTERNATIONAL ORGANIZATION OF WHICH THE U.S. IS A MEMBER.

Petitioner asked the lower courts to decide eight questions in support of his right to maintain a suit in U.S. courts under the Federal Sovereign Immunities Act, for breach of contract on a World Bank related legal development project

in Kazakstan. At the basis of these questions were guarantees that the Supreme Court had established for U.S. citizens in raising such suits.

Before the District Court, Petitioner cited the Supreme Court's ruling that, "the entire purpose of the Foreign Sovereign Immunities Act is to ensure American citizens access to courts where the rule of law and due process are applied," relying on the Supreme Court's ruling in Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

A. Petitioner raised eight issues of due process inherent in the right to maintain a suit under the Foreign Sovereign Immunities Act and that Petitioner requested be decided as a matter of right. The lower courts did not rule on any of the eight issues presented that are of constitutional importance.

The eight issues encompass both decisions of U.S. sovereignty and interests as well as protections and obligations, in general, of U.S. laws, Bar Association Ethics Codes, and other professional responsibilities, over U.S. professionals working to build rule of law overseas, in protecting U.S. interests, abroad and at home. These eight issues, presented again to the Court of Appeals and again on a petition for rehearing are as follows:

1. Whether a foreign government can claim sovereign immunity under the Foreign Sovereign Immunities Act when it hires a U.S. lawyer/expert to apply World Bank standards in preparing loan applications to the World Bank on a contract in which the World Bank and its member states (including the

U.S.) have explicit review authority and are parties/beneficiaries.

2. Whether the Foreign Sovereign Immunities Act protects U.S. policy interests in U.S. citizen professionals presenting objective, independent professional legal advice to foreign governments seeking loans from a partly U.S. funded international bank as a significant interest protected by the Act.

3. Whether the Foreign Sovereign Immunities Act protects the right of a U.S. citizen to act without pressures to violate U.S. law (e.g., falsification of loan documents, payment of kickbacks) in a contract with a foreign government, as a significant interest protected by the Act.

4. Whether the Foreign Sovereign Immunities Act protects the right of a U.S. citizen to act without pressures to violate professional responsibility codes of a State Bar Association in a contract with a foreign government, as a significant interest protected by the Act.

5. Whether the Foreign Sovereign Immunities Act allows a U.S. court to delegate U.S. sovereignty to a foreign government in the judging of a contract dispute for services of a U.S. lawyer where a key issue in dispute is whether the U.S. lawyer's performance under the contract was constrained by U.S. law, by World Bank standards otherwise reviewable under U.S. law, and by professional oaths and obligations under U.S. law.

6. Whether a plaintiff's Fifth Amendment rights to due process of law under the U.S. constitution are violated when plaintiff's ability to collect payment on a contract and/or future career interests and/or reputation and/or protection against violating U.S. laws that could result in deprivation of plaintiff's

liberty are both subject to pressures from and to be judged by that foreign government.

7. Whether a plaintiff's Fourteenth Amendment right to equal protection of the laws under the U.S. constitution as a small proprietor and independent consultant is violated when the contract payment amounts of members of this class that are in dispute will always be smaller than the travel costs for the number of witnesses a foreign government is allowed to claim, without challenge, that it needs to answer a dispute.

8. Whether a foreign government's hearsay declarations without personal knowledge are sufficient to defeat a U.S. citizen's sworn direct claims of the extent of ties to the U.S. of activities under a contract with that government in applying the commercial contacts standard of the Foreign Sovereign Immunities Act.

Since these matters are those between States, the appropriate place for them to be decided is by the Supreme Court, in proper exercise of its jurisdiction as the highest court of the land and the determining authority of disputes between the U.S. and a foreign government. By not addressing these issues, the lower courts have effectively sent them to the Supreme Court for its review.

B. Petitioner raised six arguments inherent in the right to maintain a suit under the Foreign Sovereign Immunities Act and that Petitioner requested be decided as a matter of right. The lower courts did not rule on five of the six issues presented that are of constitutional importance and that would support a decision in Petitioner's favor.

These arguments follow from the eight issues presented above. Three of the five arguments yet to be heard are based on rights and powers under the U.S. constitution, including U.S. sovereignty in international matters and the right of appellant to practice his profession in international legal development. These should be heard as a matter of right. On appeal, the arguments included two arguments regarding misuse of standards by the District Court; one of these in violation of Petitioner's 14th Amendment equal protection rights and one an implicit due process right under the 5th Amendment. These flow out of a shift of a burden of proof standard by the District Court to give unequal weight to a foreign hearsay declaration over that of a sworn statement with personal knowledge by a U.S. citizen and attorney.

On appeal, the court did not address these arguments, though all should have been heard as a matter of right. Nor did Respondent object in any way to the determination of those issues before the court. Nor did the court identify any constitutionally protected interests of Respondent that would have been jeopardized. Respondent did not even appear before the court. The court chose on its own to avoid ruling on those five arguments; which would have independently constituted sufficient grounds to rule in appellant, Petitioner's favor and support his right to maintain his suit in U.S. courts.

These five key arguments are as follows.

1. The lower court's ruling violates plaintiff's constitutional 5th Amendment due process rights that the Foreign Sovereign Immunities Act has no intent to jeopardize

The Supreme Court has made clear in Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), cited above, that

the Foreign Sovereign Immunities Act is to protect Petitioner's 5th Amendment due process rights. In open contradiction to Supreme Court decisions, the lower courts have determined to measure U.S. citizen rights against foreign governments extending only as far as the amount of money at stake and not to the traditional rights recognized by the Supreme Court; rights to be free from loss of liberty, rights to one's livelihood and reputation, and rights to a fair trial where issues that are determinative can be heard by a neutral arbiter.

Petitioner's 5th Amendment right to due process attaches here because of both property and liberty interests that have been jeopardized by actions by the Respondent during the time of the contractual relationship and are now being jeopardized by the decision of the lower courts if the ruling of the courts stands that the Petitioner's only remedy is to bring this case in Kazakstan's courts at a risk to his physical safety.

In avoiding to deal with the 5th Amendment issues, and simply addressing the money at issue in the case, the lower courts did not consider Petitioner's ability to raise issues of U.S. law and professional oaths in a foreign court or their ability to be decided objectively and knowledgeably, or the pressures on Petitioner to break the law, or the liberty interests that are at stake if Petitioner's only recourse is to risk returning to Kazakstan. Petitioner's main property interest was not merely in the form of fees but in the expectation of continued employment, livelihood, and liberty to choose his work as a result of the Respondent putting pressure on him to:

a) violate U.S. laws and put Petitioner in jeopardy of loss of liberty (jail sentence for committing the felonies of violating the U.S. False Claims Act and/or the Foreign Corrupt Practices Act);

b) violate Petitioner's professional obligations as a Member of the California Bar and a member of other profession's jeopardize his right to practice his profession.

The courts also exercised no effort and showed no concern for Petitioner's physical safety as a U.S. citizen, and offered no opinion on the court's responsibility of sending a U.S. citizen to foreign courts where his physically safety could be in jeopardy were he to return to present a case to courts that have no reason or interest to hear him in a place where he has stood in the way of the flow of loan money without international safeguards. Given the position that Kazakstan has taken on Petitioner's actions to stand behind professional oaths and U.S. law before the World Bank and U.S. courts, and the fact that these allegations are now public, Petitioner is now in the same category as others who seek to reform Kazakstan's legal system and challenge its corruption. The U.S. State Department says that such individuals in Kazakstan are in physical risk of State violence.

Despite Petitioner's raising of these issues with the lower courts, the courts made no mention or determination regarding the jeopardy to various forms of property and liberty, which are protected under the 5th Amendment of the U.S. constitution and which Petitioner would be subject to forfeit if this case is not heard by a U.S. court.

2. In seeking to protect respondent's "sovereignty", the district court jeopardizes the sovereignty of the U.S. and jeopardizes U.S. interests, in violation of Articles III and VI of the Constitution and the Foreign Sovereign Immunities Act.

The U.S. Constitution, Article III Section 1 gives the U.S. courts "the judicial power" in "all cases in law in equity, arising under this Constitution" and to "controversies * * * between a State, or the citizens thereof, and foreign states, citizens or subjects". That power and obligation is protected by Article VI, section 2, the supremacy clause, that binds judicial officers and prevents courts from waiving or transferring this sovereignty to the jeopardy of citizen rights. It is this due process right that Amendment V protects.

The Foreign Sovereign Immunities Act affirms this and carves out an exception in those cases where foreign countries could have their sovereignty jeopardized and where the U.S. courts could be overwhelmed with cases lacking any U.S. sovereignty or due process rights interests. When a U.S. citizen asserts such rights, the presumption is in favor of protecting U.S. policy and citizen interests and sovereignty.

In this case, the interests in controversy are not merely those of the contracting parties, but also the legitimate interests of the U.S. government and citizens in being able to uphold U.S. laws and standards on World Bank loan projects and to review them, to protect U.S. citizens -- and particularly the growing number of American lawyers working on international legal development projects -- against pressures by foreign governments to violate U.S. law, to assure the rights of U.S. citizens to uphold Bar Association oaths and other professional oaths, to provide for objective reports on international projects in the country's policy interests, and to ensure that U.S. laws are enforced and applied by U.S. courts against U.S. citizens without such determinations transferred to foreign courts.

In weighing the factors under the Foreign Sovereign Immunities Act to determine if this case has any impact on the United States, the lower courts ignored the interests to the

United States beyond those of the economic loss of the contract breach, in the same way it ignored all of the potential harms to Petitioner's property, safety and due process interests. Whether the U.S. courts will allow a foreign government to pressure U.S. citizens to break U.S. laws, to defraud U.S. taxpayers, under threat of non-payment for work that the U.S. government has an interest in seeing done well; in the role of helping developing countries develop rule of law and legal systems that assure contracts with U.S businesses are enforceable and not subject to arbitrary pressures, is a question of U.S. sovereignty.

The transfer of U.S. sovereignty to unilateral decision-making of foreign actors is certainly not what the Foreign Sovereign Immunities Act intended. Moreover, Respondent told the District court that because it has not signed international agreements with the U.S., judgments against it in U.S. courts will not be enforceable and it has no intent to waive its ability to evade judgment. This suggests Respondent's lack of any concern for protecting U.S. interests in this case.

3. Under the overall intent of the Foreign Sovereign Immunities Act, Respondent has no sovereignty interest at issue that is immune and that has not been previously waived, and the courts cannot create such sovereignty interest where none exists.

The Foreign Sovereign Immunities Act's overriding purpose is to "protect the rights of both foreign states and litigants in United States courts" and to deny immunity where "commercial activities are concerned" (28 U.S.C. § 1602) where that commercial activity or other facts can be used to establish an "explicit or implicit waiver" (28 U.S.C. § 1605 a) (1)), where there is "property taken in violation of international

law" and "tortuous acts or omissions of that foreign state."

In this case, there never was a sovereignty interest to be protected for two reasons:

> a) the Respondent effectively waived immunity by signing a contract that was subject to review by the World Bank and its member states, including the U.S., before it became valid, and then subjecting the work under the contract to the same standard of World Bank review and oversight and, further, because fulfillment of that contract required objective non-compromised performance of an international expert who could protect international interests outside of Kazakstan, and
>
> b) the work was to seek international loan funds from an international bank to international standards.

Moreover, the purpose of the Foreign Sovereign Immunities Act was certainly not to put U.S. citizens working overseas in positions where they might be pressured to violate U.S. law in order to be paid, or to increase discretion of foreign governments to violate international rules, or to strip U.S. citizens of any legal protections they might have under U.S. law in work conducted abroad or for a foreign government, or to let foreign governments decide unilaterally whether they would uphold the contracts that they signed without any independent or alternate forum to resolve disputes. It was to protect country's that had legitimate sovereignty issues to protect that it asserted before the courts.

In this case, Respondent never told the courts what its protected sovereignty was. However, it did misrepresent to the courts its relationship with the World Bank, in contradiction to the contract, the Terms of Reference, and several World Bank

documents that came before the court. The lower courts took no notice and created a protected sovereignty that the Respondent, itself, had not acted to protect.

4. The court's determination to accept the hearsay evidence offered by Respondent, a foreign state, about where the contract activity took place and the extent of plaintiff's work in the U.S., without scrutiny, shifted the burden of proof required in the Foreign Sovereign Immunities Act to plaintiff, a U.S. citizen, in violation of Petitioner's Fifth Amendment Rights to Due Process.

While the District Court correctly cited the burden of proof in Foreign Sovereign Immunities Act cases (Pet. App. 3a), the court neglected to apply it, in violation of Petitioner's right to due process. The standard of due process that applies in the Foreign Sovereign Immunities Act cases is to accept the facts in the light most favorable to petitioner, the U.S. citizen whom the courts have first obligation to protect. See United States v. Gaubert, 499 U.S. 315, 327 (1991); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)

Petitioner raised these issues on appeal, yet the courts refused to grant Petitioner his due process right, declaring that the proper allocation of the burden of proof was never raised at the District Court level. Such a decision by the courts defies logic. If the District Court had applied the appropriate standards of evidence and proof, there would have been no reason to ask for review when they were not applied. Such a challenge could only have been made on appeal since Petitioner is not clairvoyant.

Most disturbing is that Respondent apparently sought to mislead the court on its ties to the U.S. Though hiring an American lawyer based in the U.S. to prepare World Bank loan projects and to work with the World Bank, at the initiative of the World Bank, Respondent claimed that its breach was wholly a sovereign decision. Further, in claiming that the breach was made "in Kazakstan" as a sovereign decision, by submitting a copy of the Vice Minister's letter in Russian, Respondent withheld a key fact from the court on which the District Court relied in reaching its decision. The "sovereign" notice of breach was sent on a World Bank FAX machine from the project office established by the World Bank, with contractual review authority over the project. Petitioner submitted a true copy of that letter as received, for the court to compare with the copy submitted as Respondent's Exhibit. At the top of the letter, in English, is the very clear tag line, "WB Kazakstan" indicating that this letter was not a sovereign act by Kazakstan but open to the World Bank and its member states, including the U.S., and part of an ongoing commercial relationship with the World Bank, in the United States.

The court also accepted hearsay statements by the Vice Minister of Justice of Kazakstan, purporting that there was no established conduct between the parties to pay Petitioner in dollars to his bank account in the U.S., even though the Vice Minister's declaration cited a dollar transaction to Petitioner's bank account in the U.S. and even named the bank. The Vice Minister had not worked in Kazakstan at the time the contract was performed and had no personal knowledge of any arrangements or transactions other than the record that was a statement against Respondent's interests. The courts accepted this evidence as determinative and discounted statements by Petitioner, in violation of Petitioners 5th Amendment rights.

5. The lower court's rulings violate Petitioner's constitutional 14th Amendment right to Equal Protection.

The 14th Amendment to the U.S. Constitution guarantees "the equal protection of the laws". Yet, given the "small" amount of money in dispute and the powerful interests on Respondent's side, the District Court inferred that it would avoid hearing this case in its courtroom, even at the expense of 14th Amendment rights. Petitioner raised this issue before the Court of Appeals, as a matter of right in response to violation of his rights by the lower court. The Court of Appeals refused to hear the issue, in violation of Petitioner's right to protect his rights to due process (Pet. App. 2a)

In this case, the District Court created a test that never existed in the Foreign Sovereign Immunities Act, that takes the amount of the money in dispute and weighs it against the number of employees for the two parties; the American plaintiff on the one hand (in Petitioner's case as a consultant, only one person), and the Ministry sub-unit of a foreign country, whose travel expenses to a U.S. court for whatever number of witnesses they claim, will, by definition, always be more than the amount of money at issue. In doing so, the ruling of the District Court singled out a suspect class of small professional firms (lawyers, consultants, small business owners, sole proprietors) who will be denied the right to use U.S. courts for the same contract claims that larger organizations will be able to bring. While the District Court claims this standard is not really the basis for its decision on jurisdiction, it presents its argument on forum non conveniens as a decision "not to decide" that signals the intent of the District Court to discriminate against a class of plaintiffs.

II. THE UNITED STATES COURT OF APPEALS AND DISTRICT COURT MANUFACTURED "SOVEREIGNTY" INTERPRETATIONS TO THE BENEFIT OF A FOREIGN STATE IN VIOLATION OF PREVIOUS COURT DECISIONS ON WHAT CONSTITUTES COMMERCIAL AND OTHER TIES TO THE U.S. AND COUNTER TO THE INTENT TO CONSIDER CONSTITUTIONAL RIGHTS OF A U.S. CITIZEN AND U.S. INTERESTS IN APPLYING THE BALANCING TEST UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT.

Petitioner raised three arguments at the District and Court of Appeals on which the court ruled. In each of these areas the court manufactured an interpretation of lack of contacts to the U.S. that defies both court precedent and imagination, and that call for an exercise of the Supreme Court's supervisory power. In creating (or resurrecting tests that are no longer the law) the lower courts defied established precedents on international banking relationships, electronic communications, and long arm jurisdiction.

In general, the "elements" analysis used by the District Court as the supposed standard to be applied in Foreign Sovereign Immunities Act cases and that underlies the court's manufacture of a sovereignty interest in each of these three areas – focusing exclusively on the place of repudiation and discounting the actual work done on the contract and where it took place – is contrary to existing precedent in Republic of Argentina v. Weltover, 504 U.S. 607 (1992). There, although the act of repudiation occurred in Argentina, just as Respondent's repudiation, occurred overseas, the Supreme Court concluded that the repudiation had "direct effects" in the United States warranting exercise of jurisdiction in these courts.

Through imaginative Foreign Sovereign Immunities Act analysis, the lower court also revived the long dead "act of state" defense rejected by the Supreme Court in Alfred Dunhill v. Republic of Cuba, 425 U.S. 682 (1976). The court has made clear that a repudiation of a contract is not simply an act of state because it is by political actors in a sovereign's territory. "The situs of a decision to break or terminate a contract cannot by itself cannot be sufficient" to avoid federal jurisdiction. Eckert International v. Govt of the Sovereign Democratic Republic of Fiji, 834 F.Supp 167, 172 (E.D. Va. 1992).

Although the Supreme Court has already set the rule, the lower courts are apparently reluctant to rule against officials of a foreign State. Such a determination either must always go the Supreme Court or the court must set down an even stronger rule to ensure that its dicta will be followed as more such cases arise in the context of increasing international relations and contracts between individuals and foreign States.

1. **The lower court's determination that Petitioner lacked sufficient commercial ties to the U.S. denies international bank loan relationships as international commerce and would paralyze commercial lending and jeopardize U.S. interests, and is counter to all existing court doctrine and the intent of the Foreign Sovereign Immunities Act.**

In applying the Foreign Sovereign Immunities Act test of the significance of a party's commercial ties to the U.S. under 28 USC § 1603 d (as above), the lower courts essentially redefined the work of lawyers as non-commercial and established that a contract to prepare bank loans for a U.S. funded bank, located in the U.S., that is in fact a

party/beneficiary to the contract has no ties to the U.S. if the client is a foreign state.

Such a view would mean that any American citizen working with a foreign government to help them secure a bank loan from a commercial bank backed by U.S. guarantees or a U.S. government funded bank like the World Bank, would no longer be protected by U.S. law or professional codes. It would be a green light to every regime to pressure intermediaries to defraud international and commercial banks and to threaten American intermediaries with non-payment if they do not.

2. The lower court's determination that U.S. dollar payments to U.S. citizens in the U.S. through established wire transfer procedures are not commercial contact with the U.S. if the contract itself does not elaborate the bank account numbers is counter to all existing court doctrine and the intent of the Foreign Sovereign Immunities Act and would jeopardize international trade and public policy.

In applying the Foreign Sovereign Immunities Act test of the significance of a Respondent's commercial ties to the U.S. under 28 USC § 1603 d (as above), the lower courts simply determine the existence of a practice and of contact with the U.S. by looking for a particular device that the Foreign Sovereign Immunities Act does not specify.

In this case, the courts have manufactured a new test that defies contract law, court rulings and logic. It requires putting a U.S. bank account number in a contract that already clearly establishes, in English, payment in dollars, in a practice of payment that the Respondent already acknowledges. Such

arbitrary decision-making by the lower courts reflects a court creation of rules at a whim to suit the interests of the courts, in violation of the law and due process rights. The courts do not have the authority under the constitution or the Foreign Sovereign Immunities Act to simply create immunity of foreign States by setting any standard they wish, after the fact. That is what they have done here.

3. The lower court's determination that extensive electronic international communication does not constitute contact sufficient to be considered an "act" in the U.S. is a rewrite of long arm jurisdiction law in the U.S. and is counter to existing court doctrine and the intent of the Foreign Sovereign Immunities Act, and upholding this decision would de-legitimize international communications and trade.

In applying the Foreign Sovereign Immunities Act test of the significance of a Respondent's commercial ties to the U.S. under 28 USC § 1603 d (as above), the lower courts imply that Respondent's contacts made through forms of international communications -- telephone, FAXES, e-mail -- are not relevant contacts because they are not face-to-face in the U.S., even if sent on a World Bank FAX. If this is so, it is a rewrite of long-arm jurisdiction law in the U.S. and would de-legitimize international communications as constituting international commerce.

If face-to-face meetings in the United States become the standard for jurisdiction, foreign governments will have "immunity" from breach of contract and contracts with U.S. corporations or citizens will be unilateral and unenforceable.

CONCLUSION

The constitution did not intend for the lower courts to be making foreign policy or U.S. domestic policy by transferring sovereignty to foreign governments that manipulate the legal and professional standards to which American citizens, and particularly American lawyers, are subject in the conduct of their work. Yet, in this case, in the effort to avoid having to deal with certain types of cases that Congress and the constitution mandate them to decide, the lower courts have overridden their obligations to an American citizen and to the American public. The lower courts have transferred U.S. sovereignty and decision-making authority on World Bank loan standards, for millions of dollars in loans to be partly funded by the U.S. treasury, to a government in need of reform and that initially sought loans in violation of World Bank rules.

It was because of Respondent's inability to uphold the law of contract and to recognize international standards that Petitioner was hired, at the urging of the World Bank, specifically because of his accountability to standards and his professional and legal responsibilities as an American lawyer. It was why these very standards and oversight were written into his contract. And it is these standards and protections that the lower courts now unwittingly undermine.

The rights of an American citizen, the standards of the California Bar Association, the laws of the United States and the sovereignty of the United States, and the interests of the United States government in international obligations should be upheld The petition of certiorari should be granted and the Petitioner's breach of contract action should be allowed to proceed in a U.S. court.

Respectfully submitted.

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September 2003

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

David H. Lempert, a District of Columbia Citizen Residing Overseas,
Appellant

v.

No. 02-7132
[May 1, 2003]

Republic of Kazakhstan, Ministry of Justice,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Henderson, Randolph, and Rogers Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief filed by appellant. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the district court's order filed on September 30, 2002 be affirmed. Appellant failed to present to the district court his arguments that the dismissal of this action violates due process, equal protection, and Articles III and VI of the Constitution; that Kazakhstan waived its immunity; and that the Ministry of Justice's fax, email and telephone communications with him constitute a commercial activity under the first clause of 28 U.S.C. § 1605(a)(2). Accordingly, this court will not consider them. See District of Columbia v. Air Florida, Inc., 750 F.2d 1077.

1084 (D.C. Cir. 1984); see also World Wide Minerals, Ltd. v. Kazakhstan, 296 F.3d 1154, 1161 n.10 (D.C. Cir. 2002). Moreover, appellant's argument that the consulting agreement is an inseparable part of the commercial activity of seeking World Bank loans does not establish that this action falls within the first clause of § 1605(a)(2). Appellant has not shown that Kazakhstan's attempts to obtain loans are inextricably intertwined with the consulting agreement, which simply required appellant to prepare a report recommending reform initiatives based on the proposals of the Ministry of Justice and a local consultant. In addition, this action is based on the formation and alleged breach of the consulting agreement, not Kazakhstan's loan-seeking activity. See Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993) (an action is not "based upon" commercial activity conducted in the United States unless the conduct meets the elements of a "claim that, if prove, would entitle a plaintiff to relief under his theory of the case")'; In re Papandreou, 139 F.3d 247, 252 (D.C. Cir. 1998) (elements of breach of contract claim are "formation of the contract and its breach"). And appellant's alleged performance of some of his obligations in the United States under the consulting agreement does not constitute commercial activity "carried on in the United States by" Kazakhstan. 28 U.S.C. § 1605(a)(2). Nor did the district court err in concluding appellant failed to show that Kazakhstan's refusal to pay him constitutes an act carried on in the United States by Kazakhstan. Appellant concedes that the repudiation of the consulting agreement occurred outside the United States, and the mere transmittal to appellant of the notice of termination is not an element of the cause of action asserted here. Under the consulting agreement, providing notice of termination is a prerequisite to termination and this does not constitute the act of termination itself.

As to the third clause of § 1605(a)(2), the district court properly concluded that Kazakhstan's alleged attempts to

induce appellant to engage in illegal activity did not have a direct effect in the United States because the attempts were not the "immediate consequence of Kazakhstan's refusal to pay appellant. Republic of Argentina v. Weltover, Inc., 504 U.S,. 607, 618 (1992). Finally because neither the consulting agreement nor customary practice required that payment be made in the United States, the district court correctly held that appellant's financial loss resulting from Kazakhstan's alleged breach of the agreement did not constitute a direct effect under § 1605(a)(2). See Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1515 & n.2 (D.C. Cir. 1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX B

United States District Court for the District of Columbia Circuit

David H. Lempert, a District of Columbia Citizen Residing Overseas,
Appellant

v. No. 00-1820 (JR)
[Sept. 30, 2002]

Republic of Kazakhstan, Ministry of Justice,
Appellee

Memorandum

In this case, an American attorney and consultant seeks damages for breach of contract and unjust enrichment from the Ministry of Justice for the Republic of Kazakstan, a state agency under the laws of Kazakstan. He alleges that the Ministry of Justice (MOJ) wrongfully refused to pay his full consulting fee. His claim is for $21,600 plus prejudgment interest. MOJ moves to dismiss on four grounds: 1) lack of subject matter jurisdiction because MOJ enjoys sovereign immunity; 2) lack of personal jurisdiction because MOJ does not have sufficient contact with the District of Columbia; 3) an agreement between the parties that Kazakstan would be the forum for resolving disputes; and 4) forum non conveniens. For the reasons set forth below, the defendant's motion to dismiss will be granted on the ground of sovereign immunity.

I.

On a motion to dismiss for lack of subject matter jurisdiction, the Court may consider matters outside the pleadings. The plaintiff has the burden of establishing the Court's jurisdiction by a preponderance of the evidence and

may use affidavits and matters of public record. The truth of an allegation of jurisdictional fact contested by the defendant is not assumed on a motion to dismiss, and the court settles any contested jurisdictional facts. Phoenix Consulting, Inc. v. Republic of Angola, 216 F.3d 36, 40 (D.C. Cir. 2000).

In this case, it is undisputed that the parties entered into a contract in Kazakstan for consulting services on July 31, 1997.[2] Plaintiff's task was to travel to Kazakstan and prepare a "Legal Education Component Assessment" with recommendations for improving the quality of legal education and training of law students and government officials in Kazakstan. Def.'s Mot. Dismiss, Ex. A2. This task was part of a larger legal reform project undertaken by Kazakstan, and part of a plan to help Kazakstan obtain loans from the World Bank. Lempert's recommendations were to be based upon consultations with various government officials and other individuals in Kazakstan; upon findings that had previously been made by a local consultant and MOJ; and upon information provided by MOJ, the World Bank and other resources. Def.'s Mot. Dismiss, Ex. A3. Lempert was in Kazakstan for four weeks starting in late July 1997 working on the report. His assignment was to be completed by August 29, by "such other date a mutually agreed." Def.'s Mot. Dismiss, Ex. A2. MOJ agreed to pay Lempert a total of $27,000, payable in three portions. It paid a first installment of 203,715 tenge (Kazakstani currency, equivalent to $2,700 U.S. dollars) in Kazakstan upon the signing of the contract and another installment of $2,700 on August 5, 1997 in U.S. currency forwarded to the plaintiff's bank account in Washington, D.C.,

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[2] There is nothing in the contract, labeled "Consultants' (sic) Contract," that created an employer-employee or agency relationship.

leaving $21,600 as the outstanding payment. Def.'s Mot. Dismiss, Ex. A. Section 2 of the contract provided that "[the] contract, its meaning and interpretation, and the relations between the [p]arties shall be governed by the [l]aws of Kazakstan," and section 10 provided that any dispute arising under the contract would be "resolved in accordance with the legislation of the Republic of Kazakstan." Def.'s Mot. Dismiss, Ex. A2.

The remaining facts are disputed, although none of the disputed facts bears on the immunity question. According to Lempert, the parties negotiated over most of the contract terms and the draft work plan by correspondence, before he traveled to Kazakstan. He says that he submitted an English language version of the report to MOJ before he left Kazakstan and a Russian language version on or about September 5, 1997. He further states that the remaining payment of $21,600 owed to him was due on November 11, 1997 when he made final changes to the report. On December 14, 1997, Lempert notified MOJ that payment was overdue. He alleges that in response to his requests for payment, MOJ asked him to make modifications of his findings that were antithetical to his professional assessment of the objectives of the legal reform project. He also claims that a MOJ official asked him to pay a kickback of his contract fee when he first arrived in Kazakstan.

MOJ emphasizes that the contract was to be performed in Kazakstan and that most of the preliminary negotiations took place when Lempert was in Kazakstan. It denies the plaintiff's allegations about its reasons for not making the final payment and also denies charges of a requested kickback. A letter to Lempert from a MOJ official expressing dissatisfaction with Lempert's report suggests that the quality of the report was deemed inadequate and that Lempert's recommendations were inconsistent with the objectives of the legal reform project.

Pl.'s Resp. to Def's Mot. Dismiss, Ex. N. MOJ also points to the World Bank's findings that Lempert's allegations were groundless and that his report was not in full compliance with the requirements of the contract. Def.'s Mot. Dismiss, Ex. A8.

II. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities ACT (FSIA) "provides the sole basis for obtaining subject matter jurisdiction over a foreign state in the courts of this country." Argentine Republic v. Amerada Hess Shipping Corp. 488 U.S. 428 (1989). The Act recognizes the immunity of foreign states from suit in the United States, except in specific enumerated kinds of cases. 28 U.S.C. § 1604. A foreign state is not immune in any action that is based: (1) upon a commercial activity carried on in the United States by the foreign state; (2) upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (3) upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. 28 U.S.C. § 1605 (a) (2). "Commercial activity" is defined, unhelpfully, as "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603 (e). It may be "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603 (d). The commercial character is to be determined by reference to the nature of the conduct, act, or transaction rather than its purpose. Id. None of these three exceptions to jurisdictional immunity under 28 U.S.C. § 1605 (a) (2) applies to this case.

A. Commercial Activity Carried on in the United States

Under 28. U.S.C. § 1603 (e) and the first clause of 28 U.S.C. § 1605 (a) (2), a district court has jurisdiction of an

action based upon a commercial activity carried on in the United States by the foreign state and having substantial contact with the United States. The "based upon" requirement refers to "those elements of the claim that, if proven, would entitle a plaintiff to relief under his theory of the case," and "calls for something more than a mere connection with, or relation to, commercial activity." Saudi Arabia v. Nelson, 507 U.S. 349, 356-57 (1992). The elements of Lempert's claim that would entitle him to relief are his performance and MOJ's non-payment, both of which were in Kazakstan. The preliminary negotiations between the parties and solicitation of the plaintiff's services were not the "commercial activity" upon which the claim is based. See Janini v. Kuwait University, 43 F. 3d 1534, 1536 (D.C. Circ. 1995); In re Papandreou, 139 F. 3d 247, 253 n. 3 (D.C. Cir. 1998) ("Certainly we do not suggest that a breach of contract action could be 'based upon' the solicitation, or that the U.S. solicitation constituted the commercial activity on which the suit is based.").

MOJ's correspondence with Lempert prior to his travel to Kazakstan did not establish "substantial contact" with the United States within the meaning of FSIA.[3] See In re Papandreou, 139 F. 3d at 253 (rejecting "recruitment efforts in the U.S. as a basis for jurisdiction over a contract for employment abroad" and holding that "acts that are not themselves commercial transactions, but that are merely precursors to commercial transactions" do not give rise to

[3] Even though § 1605 (a) (2) appears to require both a commercial activity carried on in the United States and substantial contact with the United States, In re Papandreou suggests that "substantial contact" may be enough. The second prong of the § 1605 (a) (2) test is analyzed here, accordingly, out of an abundance of caution.

jurisdiction). "Some degrees of solicitation in the U.S. might satisfy the 'substantial contact' requirement," id., but not the degree shown on this record; there were no meetings between the parties in the United States, no significant availment of resources in this country to persuade Lempert to enter into the contract, and no regular recruitment efforts here to obtain an American-based consultant for the legal reform project report. See Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F. 2d 1094, 1109 (D.C. Circ. 1982) (substantial contract requirement was not met even where a representative of the foreign sovereign engaged in two business meetings with the plaintiff in the United States); Zedan v. Kingdom of Saudi Arabia, 849 F. 2d 1511, 1513 (D.C. Circ. 1988) (isolated or transitory contacts with the United States do not satisfy the substantial contact requirement). But see Virtual Defense & Dev. Int'l. Inc. v. Republic of Moldova, 133 F. Supp. 2d 1, 5 (D.D.C. 1999) (reaching a contrary result on a distinguishable set of facts).

B. Act Performed in the United States

There is no sovereign immunity from suit for an action that is based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605 (a) (2). This category is limited to "the acts (or omissions) . . . which in and of themselves are sufficient to form the basis of a cause of action." Zedan, 849 F. 2d at 1514 (citing H.R. Rep. No. 1487, at 19 (1976), reprinted in 1976 U.S.C.C.A.N. 6618); see also Maritime Int'l Nominees Establishment, 693 F. 2d at 1104 n. 16 (second clause had no applicability to breach of contract claim because the alleged breach was not claimed to have been performed in the United States). The second clause is not applicable to this case. The "act" on which the plaintiff's action is "based" -- MOJ's alleged

breach of the contract -- is not claimed to have been "performed in the United States."

C. Act Outside the United States Causing Direct Effect in the United States

A foreign state is not immune from jurisdiction where an act occurs outside this country and causes a direct effect in the United States. 28 U.S.C. § 1605 (a) (2). An effect is direct if it follows "as an immediate consequence of the defendant's . . . activity." Republic of Argentina v. Weltover, Inc. 504 U.S. 607, 618 (1992). Here, the plaintiff's theory is that MOJ's refusal to pay caused a direct effect in the United States, namely, his financial loss.[4] But the cases on which plaintiff relies does not support his argument. A refusal to pay for services performed by an American plaintiff usually does not meet the direct effect requirement. In Zedan, Saudi Arabia's promise to forward money to the plaintiff did not cause a direct effect in the United States, even though the plaintiff was a U.S. citizen and had returned to America, because there was no assurance to send the payment specifically to the United States. 849 F. 2d at 1514-15. See also Goodman Holdings v. Rafidain Bank, 26 F. 3d 1143, 1146-47 (D.C. Cir. 1994) ("direct effect" exception to sovereign immunity not triggered because United States location was not designated as place of payment). A refusal to pay may cause a direct effect if there is a contractual provision for payment to be made in or sent to the United States, but there was no such contractual provision here.

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[4] Plaintiff's other "direct effect" argument, that MOJ's alleged dissatisfaction with the report caused a direct effect because it harmed his reputation, does not merit analysis. There is nothing in the record to support this claim aside from plaintiff's own subjective feelings that his reputation has been harmed.

Neither was there a "longstanding consistent customary practice" to send payment to the United States, which Judge Wald thought might be enough, Goodman Holdings, 26 F. 3d at 1147 (Wald, J., concurring).

As there is no jurisdiction because the defendant is immune, it is not necessary to resolve the forum non conveniens issue, but it appears that Kazakstan would indeed be the appropriate forum to apply Kazakstani law (the choice of law by the parties) to a simple contract dispute for $21,600, an amount which would be exceeded by the costs of compelling several witnesses from Kazakstan to testify in the United States.

The defendant's motion to dismiss on the ground of sovereign immunity must be granted. An appropriate order accompanies this memorandum.

/s/

James Robertson, United States District Judge

APPENDIX C

United States Court of Appeals for the District of Columbia Circuit

David H. Lempert, a District of Columbia Citizen Residing Overseas,
Appellant

v. No. 02-7132
[June 30, 2003]

Republic of Kazakhstan, Ministry of Justice,
Appellee

BEFORE: Henderson, Randolph, and Rogers Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed May 14, 2003, it is

ORDERED that the petition be denied.

Per Curiam

United States Court of Appeals for the District of Columbia Circuit

David H. Lempert, a District of Columbia Citizen Residing Overseas,
Appellant

v.

No. 02-7132
[June 30, 2003]

Republic of Kazakhstan, Ministry of Justice,
Appellee

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam